

D.T.E. 01-36/02-20

Petitions of Western Massachusetts Electric Company for approval of its Transition Charge Reconciliation filing for the periods January 1, 2000 through December 31, 2000 and January 1, 2001 through December 31, 2001.

INTERLOCUTORY ORDER ON APPEAL OF HEARING OFFICER RULING
DENYING ALTERNATE POWER SOURCE, INC.'s PETITION TO INTERVENE

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I. INTRODUCTION

On March 30, 2001, pursuant to G.L. c. 164, § 1A(a), 220 C.M.R. § 11.03(4) and the Restructuring Settlement Agreement approved by the Department of Telecommunications and Energy (“Department”) in Western Massachusetts Electric Company, D.T.E. 97-120-E (2000), Western Massachusetts Electric Company (“WMECo” or “Company”) filed with the Department its reconciliation filing for calendar year 2000. That matter was docketed as D.T.E. 01-36. On March 29, 2002, WMECo filed its reconciliation filing for calendar year 2001. That matter was docketed as D.T.E. 02-20. On July 9, 2002, WMECo amended its filings in D.T.E. 01-36 and D.T.E. 02-20 to reflect the Department’s directives in Western Massachusetts Electric Company, D.T.E. 00-33 (2002).

On April 26, 2002, Alternate Power Source, Inc. (“APS”) filed with the Department a petition to intervene entitled “Intervention, Protests and Comments” (“Petition”), signed by APS’ president, Stephen M. Tuleja. On May 2, 2002, WMECo objected to the Petition as premature. On May 7, 2002, APS responded to WMECo’s objection, stating that it was concerned only with the standard offer and transmission reconciliation components of the Company’s filing. The Department issued an Order of Notice (“Notice”) in this proceeding on July 16, 2002. WMECo was required to serve a copy of the Notice on the Chairmen of the Boards of Selectmen, Mayors, Town Clerks, and City Clerks of the cities and towns in the Company’s service area and to provide a copy of the Notice to all participants in

D.T.E. 97-120, D.T.E. 00-33, and Western Massachusetts Electric Company, D.T.E. 01-101.

The Notice specifically stated that a public hearing and procedural conference would be held at the Department's offices on August 13, 2002.

In accordance with the Notice, the Department conducted its public hearing and procedural conference ("Hearing") on August 13, 2002. The Company and the Office of the Attorney General ("Attorney General") were present at the Hearing, and the Company provided its return of service and publication at that time (Tr. at 4-5). APS did not attend the Hearing; however, WMECo raised several additional objections to the APS Petition (id. at 10, 11-12, 13-14). The Attorney General did not object to APS' Petition (id. at 15).

On November 18, 2002, the Hearing Officer issued a ruling denying APS' Petition ("Ruling") on the basis that Stephen Tuleja, as president of APS, was ineligible to file the Petition on behalf of a corporation without representation by an attorney (Ruling at 4). Further, the Hearing Officer ruled that several of the issues raised by APS in its Petition were beyond the scope of this proceeding (id.). Further, the Hearing Officer noted that the Department would not allow APS to re-litigate those facts and issues already properly before other jurisdictions, namely those actions between APS and WMECo under consideration before the Federal Energy Regulatory Commission ("FERC") and the Norfolk Superior Court (id.).¹

¹ FERC issued its ruling in the matter before it on July 2, 2002. FERC Docket No. AC02-28-000. There are two actions pending before the Norfolk Superior Court, however. Norfolk Superior Court Civil Action No. 00-1967 was filed by APS against WMECo in December, 2000. Norfolk Superior Court Civil Action No. 01-02018 was
(continued...)

In addition, the Ruling stated that the Attorney General would adequately represent APS' interests (id.). The Hearing Officer did, however, grant APS status as a limited participant, entitled to file briefs and to be placed on the service list (id. at 5). APS filed its Appeal of the Hearing Officer's Ruling ("Appeal") pursuant to 220 C.M.R. § 1.06(d)(3) on November 25, 2002. On December 3, 2002, WMECo filed a response to the Appeal ("Response"). The Attorney General did not file a response to the Appeal.

II. SUMMARY OF POSITIONS

A. Alternate Power Source, Inc.

In its Appeal, APS argues that, as a registered competitive supplier of electricity in the Commonwealth of Massachusetts, it is substantially and specifically affected by this proceeding because of WMECo's proposed allocation of transmission costs to standard offer generation service (Appeal at 3). APS contends that allowing WMECo to allocate these costs in such a manner will "preclude fair and open competition in the generation supply market." Id. Further, APS argues that the Attorney General does not represent its interests in this proceeding and, under G.L. c. 12, § 11E, is not directed to serve as the sole representative of all ratepayers and competitive interests in proceedings before the Department, and may not have the resources available to do so (id. at 4, 5).

APS also argues that its interests are unique and that without its participation it is likely that those issues relevant to competitive generation would remain unraised in this proceeding

¹(...continued)

filed by APS against WMECo on December 28, 2001.

(id. at 5). APS contends that the Hearing Officer abused his discretion in failing to grant full-party intervention for APS in this proceeding (id. at 6). APS alleges that the Hearing Officer failed to offer an explanation for granting APS limited participant status, made no findings of fact regarding whether APS was substantially and specifically affected by the proceeding, failed to provide actual notice of the public and procedural hearing, and denied APS the opportunity to explain its interest in the proceeding and to notify APS that lack of counsel was a potential significant issue in this proceeding (id. at 6).

B. Western Massachusetts Electric Company

WMECo contends that the Appeal is fundamentally flawed and misleading (Response at 1). The Company argues that the Appeal seeks to investigate matters beyond the scope of the proceeding (id.). The Company also contends that APS seeks intervention not to promote open and fair competition in the generation supply market, but to position itself to receive more money than the Company has already paid APS for year 2000 services, in effect resulting in a rate increase for WMECo ratepayers (id. at 3).

WMECo contends that APS has failed to file an appeal addressing the merits of the Ruling (id. at 4). First, The Company contends that APS has not contested the fact that its Petition was filed by a non-lawyer, and that on that basis alone the Hearing Officer properly denied the Petition (id. at 4). The Company argues that the mere fact that an attorney signed the Appeal does not itself rehabilitate a deficient Petition (id.). The Company contends that the responsibility to understand and comply with applicable law lies with the petitioner, and it is not

the Department's obligation to ensure that corporations filing before the Department are in compliance (id. at 5).

Second, WMECo argues that the Hearing Officer was correct in finding that APS is pursuing the same claims raised by its Petition in other jurisdictions, and notes that APS does not contest this finding (id. at 5). WMECo contends that APS' Petition is an effort at forum-shopping which could result in conflicting rulings from FERC, Norfolk Superior Court, and the Department (id. at 6). Third, WMECo contends that the Hearing Officer was correct in finding that several of the issues raised in the Petition were beyond the scope of the Department's proceeding (id. at 6). The Company contends that APS has not contested this aspect of the Ruling (id.).

Fourth, WMECo contends that APS was not denied any procedural rights with regard to its absence at the Hearing (id. at 7). The Company argues that APS had sufficient notice of the Hearing given that the counsel filing the Appeal has been an attorney for APS on other matters before the Department and was a recipient of both the Company's July 8, 2002 filing, and the Notice (id.). WMECo argues that the Notice specifically provided for the opportunity to attend and give comments at the Hearing, and that APS has only itself to blame for failing to appear at the Hearing (id.).

III. STANDARD OF REVIEW

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. §1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion

in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978); see also Robinson v. Department of Public Utilities, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. 1, 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. Boston Edison, 375 Mass. 1, 45. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

In addition, when ruling on a petition to intervene or participate, a Hearing Officer may consider, among other factors, the interests of the petitioner, whether the petitioner's interests are unique and cannot be raised by any other petitioner, the scope of the proceeding, the potential effect of the petitioner's intervention on the proceeding, and the nature of the petitioner's evidence, including whether such evidence will help to elucidate the issues of the proceeding, and may limit intervention and participation accordingly. See, e.g. Hearing Officer's Ruling on Petitions to Intervene, D.P.U. 92-11 (1992); Hearing Officer's Ruling, D.P.U. 90-284, at 3 (April 24, 1991); Interlocutory Order on Appeal of Hearing Officer Ruling, D.P.U. 88-250 at 5,6 (March 21, 1989). The Department exercises the discretion

afforded it under G.L. c. 30A, § 10 so that it may conduct a proceeding with the goal of issuing a reasoned, fair, impartial and timely decision that achieves its statutory mandate.

Berkshire Power Development, Inc., D.P.U. 96-104, Procedural Order (January 9, 1997).

IV. ANALYSIS & FINDINGS

In considering this Appeal, the Department must first determine whether the Hearing Officer erred in his decision to deny full-party intervenor status in an adjudicatory proceeding to a corporation not represented by counsel. The Attorney General has ruled that non-lawyers may only appear as representatives of parties to adjudicatory hearings provided that appropriate rules are adopted to permit their appearance. Opinion of the Attorney General at 136 (December 24, 1975). The Department has no such regulation. A non-lawyer may petition pro se, but Mr. Tuleja did not appear in that capacity.

220 C.M.R. § 1.03(1)(a) provides that: “any person who desires to participate in a proceeding shall file a written petition for leave to intervene or participate in the proceeding.” While the Massachusetts Supreme Judicial Court has held that G.L. c. 30A grants the Department broad discretion with regard to intervenors, it has also found that such discretion is not unlimited. Boston Edison, 375 Mass. 1, 45, citing Newton v. Department of Public Utilities, 339 Mass. 535, 543 n. 1 (1959).

The Court has held that, while an interested party may seek to intervene and represent himself in a pro se manner, such an intervention is improper when non-lawyers attempt to represent the interests of others. Boston Edison, 375 Mass. 1, 45. Further, in Varney Enterprises, Inc. v. WMF, Inc., 402 Mass. 79 (1988), the Court held that with the exception of small claims matters, a corporation may not be represented in judicial proceedings by a

corporate officer who is not an attorney licensed to practice law in the Commonwealth.

Varney,

402 Mass. 79. The Court states that while there is no injustice in allowing natural persons to appear pro se, those who receive the advantages of incorporation should bear the burden of hiring counsel to sue or defend in court. Varney, 402 Mass. 79, 82, citing Walacavage v. Excell 2000, Inc., 331 Pa.Super. 137, 142-143, 480 A.2d 281 (1984). Lastly, the court in Varney held that a person appearing pro se does not represent another, as does a person appearing for a corporation. Varney, 402 Mass. 79, 82. The Court has dismissed at least one action brought against the Department raising jurisdictional issues similar to Varney. See DLS Energy v. Department of Public Utilities, No. SJ-94-0051 (1994).²

The topic of legal representation comes up from time to time in Department practice. Both legal and prudential reasons favor limiting legal representation of other persons, whether natural or corporate, to members of the bar of the Commonwealth. See Varney, 402 Mass. at 82 (1988); In the Matter of Lyon, 301 Mass. 30, 35 (1938); Opinion of the Justices, 289 Mass. 607, 613, 615 (1935). “The practice of law is personal. . . . The relationship of an attorney to his client is preeminently confidential.” Opinion of the Justices, 289 Mass. at 613. The State Administrative Procedure Act, St. 1954, c. 681, § 1, G.L. c. 30A, § 11(2), grants

² In DLS Energy v. Department of Public Utilities, DLS’ president, David Smith, filed a petition for judicial review at the Supreme Judicial Court, seeking an appeal of a Department order. The Attorney General, on behalf of the Department, sought and was granted a motion to dismiss for lack of subject matter jurisdiction under Massachusetts Rule 12(b)(6) on the grounds that Mr. Smith’s petition on behalf of DLS was without representation by an attorney and therefore void.

administrative agencies considerable discretion in evidentiary practice, save in one highly sensitive area: namely, that administrative agencies “shall observe the rules of privilege recognized by law.” Communications between a client and his attorney are privileged communications and generally may not be disclosed by the attorney without the consent of the client to whom the privilege belongs. Foster v. Hall, 29 Mass. (12 Pick.) 89, 93 (1831).

Were the Department to permit a party to one of its proceedings to be represented by some one other than an attorney, any communication made by the party or the party’s agents, Ellingsgard v. Silver, 352 Mass. 34, 40 (1967), to that non-attorney representative would not enjoy the protection of the attorney-client privilege. And it would not matter that the client made a mistake, however reasonable, as to the status of, or the ethical and evidentiary rules governing the conduct of, his non-attorney representative. Barnes v. Harris, 61 Mass. (7 Cush.) 576, 578 (1851). All communications between a party and his non-attorney representative, pertinent to material issues in the case, would, *at least in principle*, be subject to discovery and even to subpoena under G.L. c. 25, § 5A; and this is so, because, in these circumstances and under Massachusetts law, the attorney-client privilege to withhold evidence covers a client’s communications only with a representative duly admitted to the practice of law in the Commonwealth.

Because § 11(2) of Chapter 30A stresses that the rules of privilege are the sole element of judicial evidentiary practice expressly binding on an administrative agency, it is prudent on the Department’s part not to blur the lines of legal representation and, perhaps unwittingly, to encourage petitioners or parties to its cases to jeopardize their own positions. The

Department's countenancing of appearances by non-attorney representatives would result in just such a blurring and do so without countervailing benefit. This is so, despite the latitudinarian view expressed in Opinions of the Attorney General, December 24, 1975, at 136-40. Blurring the bright-line distinction as to who may represent a petitioner or a party would also be an invitation to contentious discovery disputes and unsound development of an evidentiary record. It threatens needlessly to burden our investigations and hamper "the effective operation" of the Department. Id. at 139. The course of action urged by appellant APS goes against the tenor of § 11(2) and the fundamental distinction and interest it seeks to protect.

The responsibility to understand and comply with applicable law lies with the petitioner. We find that the Hearing Officer did not abuse his discretion in denying the Petition for lack of adequate representation. The fact that APS has since retained counsel for its Appeal does not, by its nature, rehabilitate the deficiencies in the initial filing. The Ruling directed APS to retain counsel, and stated that APS would be allowed into the proceeding as a limited participant only after having done so (Ruling at 5).

While we uphold the Hearing Officer's Ruling denying APS' Petition because APS filed without counsel, we take this opportunity to discuss APS' other substantive arguments. APS' pursuit of similar claims in various jurisdictions raises the appearance of forum-shopping, however, and gives the impression that APS' efforts to obtain party status in this proceeding may be an attempt to re-litigate those issues already addressed or under consideration in other venues. The Department has a responsibility to avoid creating the potential for conflicting rulings. The Department is certainly not the appropriate forum to appeal the accounting issues

already addressed by FERC,³ and the Department is not a more appropriate forum to determine the contractual rights and obligations of WMECo and APS than the on-going litigation in Norfolk Superior Court.⁴ As these issues are beyond the scope of the Department and already decided or under consideration in their appropriate forums, the Department can accord them no significance in consideration of this Appeal.

As a final note, there are several procedural issues raised by APS in its Appeal. Most notable is APS' contention that the Department allegedly failed to provide adequate notice to APS regarding the Hearing. The Notice, issued July 16, 2002, required that WMECo provide proof of publication in the Boston Globe or the Boston Herald, as well as serving a copy on the chairmen, board of selectmen, mayors, town clerks, and city clerks of the cities and towns in the Company's service area, as well as providing actual notice to all participants in D.T.E. 97-120, D.T.E. 00-33, and D.T.E. 01-101. The Company filed its return of service and proof of publication pursuant to the directives stated in the Department's July, 16, 2002 Order of Notice. In addition, the Company, in its Response, states that it provided a copy of the both the Notice and the Company's July 8, 2002 filing to the attorney filing the appeal on behalf of APS. The Notice was unambiguous in its terms and in compliance with 220 C.M.R.

³ APS's petition to FERC sought a determination regarding whether transmission congestion charges should be recorded in Account 565, Transmission of Electricity by Others, or Account 555, Purchased Power. In a letter dated July 2, 2002, FERC stated that as an accounting rule, WMECo could classify congestion costs as either Account 555 or Account 565 costs. FERC Docket No. AC02-28-000.

⁴ APS' two civil actions against WMECo in Norfolk Superior Court seek clarification of the billing quantities paid by WMECo to APS under their December 10, 1999 "Standard Offer and Default Service Wholesale Agreement."

§ 1.06(5). APS, therefore, received notice of the Hearing, whether by the Notice received through its present counsel or through publication through a paper of statewide circulation. APS' failure to attend the Hearing cannot be attributed to any deficiency in the Department's Notice.

V. RULING

Accordingly, after due consideration, it is hereby

ORDERED: That the appeal of Alternate Power Source, Inc., of the Hearing Officer's Ruling denying the petition of Alternate Power Source, Inc., to intervene in this proceeding as a full-party is DENIED.

By Order of the Department,

Paul B. Vasington, Chairman

James Connelly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner